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OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

AMICI CURIAE BRIEF OF
ASSOCIATION OF WASHINGTON CITIES AND CITY OF FORKS

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I. INTRODUCTION

The Association of Washington Cities (“AWC”) and City of Forks submit this Amici Curiae Brief in support of respondent City of Port Angeles (the “City”) and request the Court to uphold the decision of the Court of Appeals in *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008). In that decision, the Court of Appeals held that the initiatives submitted to the City of Port Angeles by two political action committees were beyond the scope of the local initiative power because the subjects of those initiatives were administrative, not legislative, in nature.¹ Local initiatives may not address administrative actions. The standard in Supreme Court case law for an administrative action is an action the “pursues a plan already adopted by the legislative body itself or some power superior to it.” *E.g.*, *Heider v. Seattle*, 100 Wn.2d 874, 876, 675 P.2d 597 (1984) (emphasis supplied).

In this case, both the trial court and the Court of Appeals correctly held that the initiatives submitted to the City are administrative in nature.

¹ The Court of Appeals also held that the initiatives were beyond the local initiative power because they interfered with a power granted exclusively to the Port Angeles’ City Council by the Legislature. This brief addresses only the administrative action issue.

The City's operation and management of its water utility are governed by comprehensive regulations adopted by the Washington Department of Health and the Washington Board of Health, as required by the Washington Legislature. These detailed regulations specify what additives may be included in the City's water supply, how the decisions to put additives in the water supply must be made (including decisions regarding fluoridation), what concentrations of those substances may be present in the City's water supply, and precisely how potentially harmful substances in the water supply must be tested and reported. These comprehensive, mandatory regulations constitute a plan adopted by a power superior to the City.

The initiatives submitted to the City by the two political action committees clearly fall within the subjects addressed by the comprehensive regulatory plan adopted by the power superior to the City and seek to control the operation and management of the City's water supply utility. The initiatives seek to establish a property right in water service; to establish specific standards for what additives may be added to the City's water supply; to establish numeric standards for fluoride that are inconsistent with Washington Board of Health standards; to overturn prior City decisions regarding additives to the water supply that are consistent

with the Board of Health standards; and to establish detailed testing and reporting standards. These are administrative matters regarding the operation of the City's water supply utility that are not subject to the local initiative power.

More importantly, if these initiatives are allowed as local initiatives, it would create an extremely damaging precedent. Every conceivable detail of the management and operation of all types of local utilities could then be subject to decision by local initiative – for example, whether a local water utility uses ductile or plastic pipe for conveyance, whether drinking water is treated with chlorine or UV radiation, whether a local electric utility should convey via traditional poles or underground, or whether water from a local wastewater utility is discharged or infiltrated. All of these municipal utilities are governed comprehensively by state regulation, and decisions about their operation and management are controlled by and taken pursuant to the standards in the comprehensive state regulation, and are therefore administrative decisions. Allowing those local utilities to be managed by the local initiative process, which must be reserved only for truly legislative subjects, would create enormous expense and uncertainty for the 57 cities that have adopted local

initiative and referendum powers and would be extremely poor public policy.

II. STATEMENT OF INTEREST

Founded in 1933, AWC is a private, nonprofit, nonpartisan corporation that represents Washington's cities and towns in a wide variety of venues, including representation before the state legislature, the state executive branch and with executive agencies. While membership in AWC is voluntary, AWC consistently maintains 100 percent participation from Washington's 281 cities and towns.

The City of Forks was incorporated in 1945 and is presently a Washington non-charter Code city. The City of Forks operates a proprietary water supply system and has been fluoridating its water supply since the 1950s. The City of Forks is also a member of the AWC.

AWC is a leading advocate for and representative of Washington cities and towns. Most cities operate some types of utilities, whether they are municipal drinking water systems such as the utility operated by the City of Port Angeles in this case; storm water utilities; solid waste and waste water utilities; public transportation utilities; or electrical utilities. The vast majority of Washington cities operate proprietary water system

utilities, like the City of Port Angeles and the City of Forks.² Many of those cities fluoridate their water system pursuant to the detailed regulations of the Board of Health and Department of Health.³ Chap. 246-290 WAC; *see* WAC 246-290-460 (requiring Washington Department of Health approval for any decision to fluoridate and requiring special monitoring for fluoridation). AWC does not take a position on fluoridation. Rather, from the Amici's perspective, this case is about whether the operation and management of city and town utility systems can be undertaken by local initiative. The Court of Appeals correctly held that those are administrative actions, which are undertaken pursuant to the comprehensive plan of regulation adopted by the Washington Board of Health and Department of Health, and are therefore not subject to the local initiative power. AWC and the City of Forks request this Court to uphold that Court of Appeals decision.

² *See* Department of Health, Office of Drinking Water website: http://www.doh.wa.gov/ehp/dw/our_main_pages/data-download.htm.

³ Washington Office of Drinking Water shows that approximately 40 cities adjust levels of fluoride in drinking water, and many more systems receive and distribute only fluoridated water from other sources. *See* <http://www.doh.wa.gov/ehp/dw/fluoride/htm>.

III. STATEMENT OF THE CASE

Amicus adopts the Statement of the Case in the Brief of Respondents.

IV. ARGUMENT

A. Local Initiatives May Not Address Administrative Subjects, Such As the Operation of Municipal Water Systems.

The power to adopt legislation directly through the local initiative process is limited to actions that are legislative in nature. *Heider*, 100 Wn.2d at 876; *Seattle Building and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748, 620 P.2d 82 (1980). The consistent standard used by this Court to determine whether a function is legislative or administrative is the following:

The power to be exercised is legislative in nature if it prescribes a new policy or plan; whereas, it is administrative if it merely pursues a plan already adopted by the legislative body itself or some power superior to it.

Heider, 100 Wn.2d at 876; *Seattle Building and Constr. Trades*, 94 Wn.2d at 748.

In *Heider*, for example, the City of Seattle had established a comprehensive street name ordinance. The Seattle City Council subsequently passed an ordinance changing the name of one of Seattle's streets from Empire Way to Martin Luther King Jr. Way. Local businesses sought to overturn that ordinance by referendum. Even though

this was a permanent change and was enacted by ordinance by the Seattle City Council, the Supreme Court held that it was administrative in nature because it did not establish new policy, but merely pursued the plan enacted in the comprehensive street name ordinance. *Heider*, 100 Wn. 2d at 877.

The *Heider* court relied on the earlier case of *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976). In *Leonard*, the City of Bothell had enacted a zoning code, which included criteria for rezones. The City then passed an ordinance rezoning a 141-acre parcel pursuant to the criteria in its zoning code. A referendum was submitted to the City seeking to overturn the rezoning ordinance. The Supreme Court held that the rezone ordinance was not subject to the local initiative or referendum power. The City's action was administrative, not legislative, because it was taken pursuant to the guidance in its zoning code that was already adopted. *Leonard*, 87 Wn.2d at 850.

This case is identical. The City's operation of its municipal water system is governed by the detailed regulatory framework established by federal and state law, including the comprehensive regulatory scheme enacted by the Washington Board of Health and Department of Health specifying what additives may be added to drinking water, what

concentrations may be present, and how those concentrations must be measured and reported. As described in more detail below, the actions in the proposed initiatives address precisely those subjects. As a result, those actions must necessarily be undertaken pursuant to that controlling policy and regulatory framework of a power superior to the City.

B. Federal and State Law, Including Comprehensive Administrative Regulations, Provide a Mandatory Regulatory Framework for the Operation of the City's Water System, Including All Additives to Drinking Water.

The City's operation of its municipal water system is a proprietary activity. *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951); *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1176 (2006). More importantly, the City's operation of its municipal water system is done pursuant to regulatory policy established in the comprehensive and detailed federal and state regulations adopted by a "power superior to" the City. That detailed federal and state regulatory scheme establishes controlling regulations and policies for all the actions taken by the City in the operation of its water utility, including all the types of actions proposed in the initiatives submitted to the City in this case.

Congress enacted the Safe Drinking Water Act in 1974 and required the Environmental Protection Agency (EPA) to set drinking

water standards for all public water systems. 42 U.S.C. §300g-1. Among other regulations, the EPA sets maximum concentration levels for any substance that “may have an adverse effect on the health of persons.” 42 U.S.C. §300g-1(b)(1)(A). The EPA has granted the State of Washington primacy to implement the Safe Drinking Water Act. *See* RCW 70.119A.080.

The Washington Legislature has charged the State Board of Health with adopting rules to assure safe and reliable public drinking water, including rules regarding system design, water quality standards, monitoring requirements, certification requirements, management requirements, planning requirements, operational requirements, and quality standards. RCW 43.20.050(2); RCW 70.142.010. The Legislature created only one exception allowing other entities to make water quality standards for drinking water – local health departments in counties with populations over 125,000 may establish water quality standards based on best available science that are more stringent than the Board of Health standards. RCW 70.142.040.

The Board of Health subsequently adopted detailed regulations governing all aspects of the operation of the City’s water utility. Chap. 246-290 WAC. Those regulations cover engineering requirements,

planning requirements, water system design requirements, water quality requirements, water additive requirements, system operation requirements, and reporting and certification requirements. *Id.* For example, all additives to drinking water must be listed in the ANSI/NSF Standard 60⁴ or accepted by the Washington Department of Health, and the application of all drinking water additives must comply with ANSI/NSF Standard 60 or be approved by the Department of Health on a case-by-case basis.

WAC 246-290-220. Maximum levels of substances that might be harmful to any person's health,⁵ including additives to drinking water, are governed by the maximum levels set in WAC 246-290-310, and comprehensive monitoring and reporting are required by WAC 246-290-416, WAC 246-290-455, and WAC 246-290-480. With respect to fluoridation of drinking water, written approval of the Department of Health is required for any such decision, and special monitoring, sampling and reporting requirements are specified in WAC 246-290-460.

⁴ The ANSI/NSF standards are promulgated by the American National Standards Institute and NSF International (formerly National Sanitation Foundation) and are incorporated into the Washington Administrative Code. ANSI/NSF Standard 60 covering drinking water additives and ANSI/NSF Standard 61 covering materials in contact with drinking water are incorporated into WAC 246-290-220.

⁵ Such substances are defined as a "contaminant" by WAC 246-290-010.

Given the comprehensive direction and regulation from the Department of Health and Board of Health, it is without doubt that the City's operation of its water utility (including decisions regarding additives to drinking water) is done pursuant to the policies and regulations established by the a power superior to the City and are, therefore, administrative actions. In an earlier case challenging the City's decision to fluoridate its water system and accept the fluoridation system from the Washington Dental Service Foundation, the Court of Appeals specifically held that the City's decision to fluoridate the public water supply wan an action taken under a program administered by the Washington Department of Health. *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 220, 151 P.3d 1079 (2007).

C. The Proposed Local Initiatives Address Subjects That Are Governed By a Comprehensive Plan of Regulation Adopted By a "Power Superior To" the City.

An examination of the proposed initiatives shows that they are squarely within the activities regulated by the Department of Health and Board of Health, that they affect the operation of the City's water utility undertaken pursuant to those Board of Health and Department of Health plans, and that they are therefore administrative actions.

The Our Water-Our Choice initiative (titled the Medical Independence Act) first states that access to City water is a property right and requires compensation to any customer if the City water supply is fluoridated. This plainly affects the operation of the administration of the City's proprietary utility. That proposed initiative goes on to make it unlawful to put any additive in public water that might affect bodily functions, sets numeric limits on fluoride in water, and repeals the City's 2003 decision to fluoridate the City's water supply. As discussed above, all these actions are administrative because the types of additives that can be added to the City's water supply, the maximum concentrations of fluoride in the City's water supply, and the decision to add fluoride itself are all actions taken pursuant to the comprehensive scheme of regulation enacted by the Board of Health, which specifies which additives may be added to the water supply, how they are approved by the Board of Health, how fluoridation is approved by the Department of health, what concentrations are permissible to preserve public health and how those concentrations are to be tested, monitored and reported. WAC 246-290-220; WAC 246-290-310; WAC 246-290-416, WAC 246-290-455, WAC 246-290-480; WAC 246-290-460.

Similarly, the initiative proposed by the political action committee Protect Our Waters (titled the Water Additives Safety Act) prohibits substances added to drinking water to affect physical or mental functions unless approved by the Federal Drug Administration (FDA),⁶ specifies testing regimens for all additives to drinking water that are inconsistent with the Board of Health regulations, sets numeric standards for fluoride in drinking water, and prohibits fluoridation unless approved by the FDA (which amounts to a prohibition because the FDA does not regulate drinking water, *see* f.n. 3). As with the Our Water-Our Choice initiative, all these proposed actions are administrative in nature because they fall squarely within the subjects regulated by the comprehensive regulations adopted by the Department of Health and Board of Health. As discussed above, this regulatory scheme addresses the types of additives that can be added to the City's water supply, how additives are tested and monitored in the water supply, the maximum concentrations of fluoride in the City's water supply, decisions to add fluoride to the City's water supply, how

⁶ This amounts to a blanket prohibition because the FDA does not regulate additives to drinking water. Rather, Congress has given that responsibility to EPA in 42 U.S.C. 300g-1, and the FDA and EPA have agreed that the Safe Drinking Water Act of 1974 repealed any FDA authority over water used for drinking water purposes and gave that authority to the EPA. *See* FDA MOU 225-79-2001 which is in the administrative record at RPC 180-183 and RPC 216-217.

those decisions must be approved by the Department of Health, what concentrations of “contaminants” are permissible to preserve public health, and how those concentrations are to be tested, monitored and reported. WAC 246-290-220; WAC 246-290-310; WAC 246-290-416, WAC 246-290-455, WAC 246-290-480; WAC 246-290-460.

The only argument raised by appellants is that their proposed initiatives are legislative because the City *itself* does not have an ordinance expressly setting permissible maximum levels for drinking water additives and testing methods. Therefore, appellants argue, their proposed initiatives must be legislative because they allegedly set local maximum levels for fluoride, provide other local standards for additives to drinking water (measured by non-existent FDA standards), and provide local methods for testing additives to drinking water.

Appellants’ argument misstates the long-established standard employed by Washington courts for determining whether an action is legislative or administrative. The standard is not whether the City itself has adopted a plan regulating additives to public drinking water, but whether a plan has already been adopted “by the legislative body [of the City] itself or some power superior to it.” *Heider*, 100 Wn.2d at 876;

Seattle Building and Constr. Trades, 94 Wn.2d at 748 (emphasis supplied).⁷

Here, the Washington Legislature, the Washington Department of Health and the Washington Board of Health are all powers superior to the City, and their comprehensive regulations constitute a plan regulating additives to public drinking water and providing the framework and criteria for all City decisions regarding the operation its drinking water utility and the additives (and their concentrations) that may be used in the operation of that water utility. For that reason, the City actions implementing that general plan are administrative, not legislative.

It is also true that the City also does not have authority to adopt water quality standards for substances in drinking water stricter than those adopted by the Board of Health. Only County's with populations of

⁷ The only authority cited by appellants on this subject is a 1965 California case, *Hughes v. City of Lincoln*, 43 Cal. Rptr. 306, 232 Cal App. 2d 741 (1965), which is mentioned in passing in a footnote in the appellants' supplemental brief. That case involved a petition to prohibit fluorides in the local drinking water system and, using a completely different standard than the controlling standard under Washington law, the California court determined it was legislative action. This decision is also outdated because it was decided prior to Safe Drinking Water Act of 1974 and the comprehensive regulatory scheme adopted by the Washington Board of Health. In addition, the initiatives in this case are completely different because they purport to establish standards for all additives to drinking water, specific numeric standards for fluoride in drinking water, and detailed testing procedures for additives to drinking water.

125,000 or more may adopt water quality standards more stringent than the Washington Board of Health standards and only if based on best available scientific information. RCW 70.142.040. Citing to irrelevant authority, appellants argue that the City does have such authority. But appellants confuse the authority to take an action with whether that action is administrative or legislative. The City's substantive authority to take such actions is not an issue in this appeal.⁸ Whether or not the City has such authority, any such actions by the City would involve subjects governed and guided by the comprehensive plan of regulation already adopted by the Washington Department of Health and Board of Health, and are therefore administrative actions.

Because the ordinances in the proposed initiative petitions would affect administrative matters, not legislative matters, the initiatives are beyond the scope of the local initiative power for the City of Port Angeles.

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⁸ The Court of Appeals expressly declined to decide whether the initiatives are within the City's power to enact. *City of Port Angeles*, 145 Wn. App. at 879-880.

V. CONCLUSION

For all the reasons above, amici curiae AWC and City of Forks request the Court to uphold the decision of Division Two of the Court of Appeals.

RESPECTFULLY SUBMITTED this 21st day of January 2010.

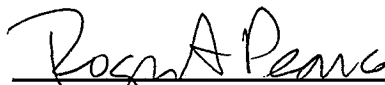
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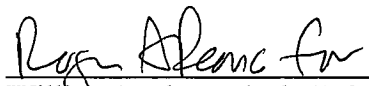


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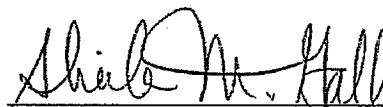
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